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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re ROBERT EUGENE WAINSCOTT,
on Habeas Corpus.

E070832

(Super.Ct.Nos. RIF153356 &
RIF10001335)

OPINION

ORIGINAL PROCEEDINGS; petition for writ of habeas corpus. Becky Dugan,
John M. Davis, and Harry (Skip) A. Staley[†], Judges. Petition is GRANTED.

Randall Conner, under appointment by the Court of Appeal, for Petitioner.

Xavier Becerra, Attorney General, and Adrienne S. Denault, Deputy Attorney
General, for Respondent.

[†] (Retired judge of the Kern Super. Ct. assigned by the Chief Justice pursuant to
art. VI, § 6 of the Cal. Const.)

We have reviewed and considered the petition and record in this matter. The Attorney General has filed an informal response at this court's invitation recommending a grant of the petition. We have determined that resolution of the matter involves the application of settled principles of law, and relief is therefore appropriate in this instance without the need for an order to show cause.

I.

FACTUAL BACKGROUND¹

Petitioner Robert Eugene Wainscott (Wainscott) has filed a petition for habeas corpus to address a sentencing error related to his 2011 conviction in two consolidated criminal cases. Wainscott failed to object to the error when he was first sentenced, and he did not raise the issue in his first appeal, *Wainscott I*. After being resentenced several times, Wainscott sought relief from the same sentencing error through a second appeal (*Wainscott II*). We rejected the claim, concluding that under the California Supreme Court case of *People v. Scott* (1992) 9 Cal.4th 331 (Scott) the matter had been waived. Now, Wainscott asks this court again to correct his sentencing error, this time through a claim of ineffective assistance of trial and appellate counsel. Because such a claim is cognizable on habeas corpus independent of any waiver issue, we review the matter on its merits and grant the requested relief.

¹ The facts contained herein are derived from our opinions in Wainscott's two appeals, *People v. Wainscott* (Dec. 7, 2012, E053674) [nonpub. opn.] (*Wainscott I*), and *People v. Wainscott* (March 7, 2018, E066445) [nonpub. opn.] (*Wainscott II*).

A. *The Underlying Case and Initial Sentencing*

In July 2009, Wainscott committed two acts of theft of commercial tires through fraudulent means. He made a third attempt at the same crime in September 2009, but was discovered and arrested. He was charged with six felony counts related to the three incidents (counts 1 through 6). While he was out on bail, Wainscott was rearrested in December 2009 for a 2008 incident in which he took possession of an allegedly stolen tractor and trailer (counts 7 and 8). He was later released on his own recognizance. In February and March 2010, Wainscott committed acts of vandalism and domestic violence against his girlfriend and was arrested once again. After being released on bail, Wainscott shoplifted an item at a Home Depot in May 2010, and had another altercation with his girlfriend in June 2010. Shortly thereafter he was arrested and held without bail.

The various offenses were initially charged as six separate cases, but were consolidated into two cases for trial. The first case, number RIF153356, included nine theft-related counts; counts 1 through 6 related to the three incidents of theft and attempted theft in July and September 2009, counts 7 and 8 (for possession of stolen property) involved the 2008 tractor/trailer incident, and count 9 was based on theft for the May 2010 shoplifting charge. The second case, number RIF10001335, involved four counts, two felonies and two misdemeanors, related to the vandalism and domestic violence incidents in February, March, and June 2010.

The two cases were tried consecutively. At trial on the domestic violence matter, a jury convicted Wainscott on all four counts, including the two felony charges from

February and March 2010. The court found true two on-bail enhancements (Pen. Code,² § 12022.1), as well as a five-year serious felony prior conviction. The theft case was then tried, and Wainscott was convicted on counts 1 through 6, and count 9. He was found not guilty as to counts 7 and 8. The court in that case found true four on-bail enhancements based on the People's argument that count 9 was committed while Wainscott was out on bail on four other cases, counts 1 through 6 (case 1), counts 7 and 8 (case 2), the February 2010 domestic violence charge (case 3), the March 2010 domestic violence charge (case 4). Wainscott did not challenge the true finding of the on-bail enhancements, and neither defense counsel, the prosecution, nor the court recognized that one of the four on-bail enhancements (case 2) was based on charges which resulted in acquittals.

At a combined sentencing hearing, Wainscott was sentenced in the domestic violence case to 12 years four months. The court found true two on-bail enhancements, but stayed their imposition. In the theft case, the court sentenced defendant to an additional eight years. It found true four on-bail enhancement allegations, but imposed only one two-year enhancement, and stayed the remaining three. The total sentence was 20 years four months.

Wainscott appealed on other bases in *Wainscott I*, but his attorney failed to raise the issue of the improper on-bail enhancement. This court reversed the trial court's true

² All further statutory references are to the Penal Code unless otherwise indicated.

finding regarding a serious felony prior and remanded the case for resentencing. The conviction was affirmed in all other respects.

On remand, the sentencing court reduced Wainscott's sentence because of the stricken five-year prior enhancement, but it imposed the three previously stayed on-bail enhancements, resulting in a sentence of 18 years four months. Wainscott was not present at that hearing. In 2015, Wainscott successfully reduced the May 2010 shoplifting conviction to a misdemeanor under Proposition 47, and his sentence was reduced to 15 years four months. At resentencing, the court re-imposed the four on-bail enhancements, despite the fact that the May 2010 theft, now a misdemeanor, was being used as the secondary offense for all four enhancements. Wainscott then challenged his new sentence in a habeas corpus petition due to his absence from the 2013 sentencing hearing. He also claimed his prior appellate counsel provided ineffective assistance by failing to appeal the 2013 sentence and order new probation reports before resentencing occurred. The People conceded and the petition was granted, resulting in another resentencing hearing in 2016.

Wainscott's habeas counsel did not raise the issue of on-bail enhancements in the petition, but at the 2016 resentencing hearing he attacked the court's application of four on-bail enhancements, contending only two were valid as of 2016. The court refused to hear the arguments, but agreed to strike one enhancement because count 9 was no longer a felony. However, the court found insufficient evidence to strike any of the other three enhancements, and Wainscott was resentenced to 15 years.

Wainscott appealed his sentence yet again, claiming the sentencing court erred in refusing to consider his challenge to the enhancements or strike them as improper. On March 7, 2018, this court affirmed the sentence in *Wainscott II* after concluding that Wainscott waived the sentencing issue by failing to raise it in his prior appeal. Wainscott filed the instant petition on July 9, 2018, and this court issued remittitur on July 26, 2018, in *Wainscott II*.

II.

DISCUSSION

As a threshold matter, this court chooses to exercise its discretion to consider this petition notwithstanding the fact that it was not first brought in the trial court, because it was filed while the second appeal was still pending in this court. (See *People v. Seijas* (2005) 36 Cal.4th 291, 307.) Moreover, Wainscott's claim is not barred by *Waltreus*³ and its progeny despite the fact that the same sentencing issue was previously rejected on appeal because the allegations of ineffective assistance of counsel resulting in an unlawful sentence are cognizable on habeas corpus. (See *Scott, supra*, 9 Cal.4th at p. 356, fn. 18; *In re Spears* (1984) 157 Cal.App.3d 1203, 1208.) We therefore proceed to the merits.

To state a claim for ineffective assistance of counsel, a petitioner must show his or her counsel's representation "fell below an objective standard of reasonableness" "under prevailing professional norms" and that absent such errors, there is a reasonable

³ *In re Waltreus* (1965) 62 Cal.2d 218, 225.

probability that the outcome of the proceeding would have been different. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 690, 694.) The Attorney General correctly concedes that the performance of both Wainscott's trial counsel and his appellate counsel was deficient under the *Strickland* standard. It is clear that the court's true finding on the on-bail enhancement based on counts 7 and 8 was error, because those counts resulted in acquittals and do not support the enhancement. (*People v. McClanahan* (1992) 3 Cal.4th 860, 869 [both the primary and secondary offense must result in convictions for a section 12022.1 enhancement to apply].) Wainscott's trial counsel had the chance to object to the error prior to sentencing, and again during Wainscott's 2013 resentencing, but did not do so. His actions were therefore inadequate. (*People v. Cropper* (1979) 89 Cal.App.3d 716, 719 [defense counsel must be sure the sentence is based on complete and accurate information].) His appellate counsel's failure to raise the on-bail enhancement issue in the first appeal also fell below acceptable standards, because appellate counsel has a duty to prepare a brief setting forth all arguable issues. (See *People v. Barton* (1978) 21 Cal.3d 513, 519.) As a result, Wainscott was prejudiced by an invalid sentence. We therefore find that Wainscott's petition states a valid claim of ineffective assistance of counsel.

We next address the issue of how many on-bail enhancements are supported by counts 1 through 6 of the theft case and the two 2010 felonies in the domestic violence case. Section 12022.1 allows a sentence to be enhanced by two years when a defendant is arrested for a second felony offense while released on bail (or on his own

recognizance) for a prior felony offense. (§ 12022.1, subd. (b).) Where a defendant is released on bail after being arrested for two separate felony offenses, and then commits a third felony offense for which he is convicted, two separate on-bail enhancements are supported. (See *People v. Warriner* (1988) 200 Cal.App.3d 1352, 1354-1355).

However, only one enhancement may be imposed for each primary offense, even where a defendant is found guilty of multiple secondary offenses. (*People v. McNeely* (1994) 28 Cal.App.4th 739, 743; *People v. Mackabee* (1989) 214 Cal.App.3d 1250, 1260-1262.)

This is due to the fact that on-bail enhancements are imposed based on a defendant's offender status, and not the nature of the offense. (See *People v. Nguyen* (1988) 204 Cal.App.3d 181, 195, citing *People v. Tassell* (1984) 36 Cal.3d 77, 90, overruled on other grounds by *People v. Ewoldt* (1994) 7 Cal.4th 380.) Here, counts 7 and 8 did not result in convictions, and count 9 was reduced to a misdemeanor, so they may not be used to support either a primary or secondary offense. Counts 1 through 6 were consolidated into one case, so they constitute one primary offense for which Wainscott was released on bail. The holdings in *McNeely*, *Mackabee*, and *Nguyen* require a finding that the February and March 2010 felony convictions in the domestic violence case support only one secondary offense. Thus, Wainscott is subject to only one on-bail enhancement based on the existing felony convictions in this case, and two of the enhancements must be stricken.

Typically, upon a showing of a prima facie case, this court would issue an order to show cause. (See *People v. Romero* (1994) 8 Cal.4th 728, 740.) However, where the

opposing side stipulates “ ‘to the truth of the petition’s allegations and to the requested relief,’ ” this court “ ‘may grant relief without issuing a writ of habeas corpus or an order to show cause.’ ” (*In re Campbell* (2017) 11 Cal.App.5th 742, 754, quoting *Romero*, at p. 740, fn. 7).) We have such a stipulation here. The Attorney General acknowledges the sentencing error and recommends that this court grant Wainscott’s petition, strike the two unproven on-bail enhancements, and remand the matter for resentencing. As such, the Attorney General has waived his right to filing a return, and we may grant the petition forthwith.

III.

DISPOSITION

Petitioner Robert Eugene Wainscott’s petition for habeas corpus is GRANTED. The two on-bail enhancements imposed pursuant to section 12022.1 which were predicated on counts 7 and 8 are hereby ordered stricken, and this case is remanded to the trial court for resentencing in a matter consistent with this court’s findings.

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SLOUGH

J.

We concur:

RAMIREZ

P. J.

McKINSTER

J.